Document #4638

MEMORANDUM **JULY 25, 1985**

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: RICHARD P. GARVER, DEPUTY DIRECTOR
FOR COMMUNITY DEVELOPMENT
OWEN DONNELLY, SENIOR PROJECT COORDINATOR

SUBJECT: **SOUTH STATION URBAN RENEWAL PROJECT: REQUEST AUTHORIZATION TO ENTER INTO AN AGREEMENT WITH THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY FOR THE CONSTRUCTION OF PHASE I**

In 1979 the BRA conveyed title to the South Station to the MBTA while retaining ownership of and development rights to a parcel of air above portions of the station property. The Deed also defines certain respective obligations of the BRA and the MBTA with regard to the development of an inter-modal transportation center and mixed use project at the South Station.

During the intervening years both parties through mutual cooperation and coordination have been preparing plans and seeking funding for their portions of the project in pursuit of fulfilling their respective obligations. The first construction contract, which involves Phase I of the project, is being undertaken by the MBTA and is made up of both BRA and MBTA elements. The section of the Phase I contract which is of primary concern to the BRA involves the construction of foundations and support columns which are needed for the BRA air rights development. The agreement herein recommended for Board action sets out the arrangements between the parties in carrying out the Phase I of the project.

The major terms of the agreement are summarized as follows:

1. the MBTA is obligated to construct Phase I of the project, including the BRA portion of the project, and to certify upon completion of the construction that the foundations will carry the loads specified by the BRA for its air rights program;

2. the BRA is obligated to pay up to $6 million for the costs of its portion of the Phase I contract. The source of funds for the $6 million are:

UMTA	$3,000,000
EOTC	1,600,000
EDA	650,000
CITY CAPITAL	750,000

3. the agreement provides the BRA access to the construction site and documents so that construction activities can be monitored for compliance to contract specifications and so that accurate records of the BRA portion of the construction progress can be maintained for payment authorization purposes; and

4. there are adequate provisions which spell out procedures for BRA authorization of payments, change orders, cost overruns and mediation of disputes.

The agreement has been negotiated with the MBTA in a spirit of cooperation and provides for a sound basis for both parties to meet their respective obligations in carrying out this joint venture. The terms provide the BRA with adequate protections and assurances to insure that the foundations and columns needed to support the BRA's air rights development program will be constructed.

It is therefore recommended that the Director be authorized to execute the subject agreement attached hereto.

An appropriate vote follows:

VOTED: That the Director be and hereby is authorized to execute a contract with the Massachusetts Bay Transportation Authority in the amount of $6 million which shall be substantially in the form attached hereto and paid for with U.M.T.A., E.O.T.C., E.D.A. and City Capital funds.

MBTA/BRA

SOUTH STATION

TRANSPORTATION CENTER/MIXED USE PROJECT

PHASE I AGREEMENT

This is an Agreement made on , 1985, by and between the MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ("MBTA") and the BOSTON REDEVELOPMENT AUTHORITY ("BRA") both of which are bodies politic and corporate, organized and existing pursuant to the General Laws of the Commonwealth of Massachusetts.

PREAMBLE

WHEREAS, BRA conveyed to MBTA, by Deed dated August 8, 1979, ("Deed"), certain property located in Boston, Massachusetts and known as South Station (hereinafter "Property"), which deed is recorded in Suffolk Registry Book 9183, page 403; and

WHEREAS, by the Deed, BRA retained ownership of and development rights to a parcel of air above the Property (hereinafter called the "Air Rights Parcel"), as described in the Deed; and

WHEREAS, the Deed recites certain obligations on the part of BRA and MBTA with regard to the funding and construction of the foundations and supports for BRA's development of the air rights property; cooperation in planning and construction the South Station Transportation Center on the Property; and granting of easements and other matters; and

WHEREAS, the MBTA is proceeding with the construction of its new transportation facility and for the foundations and supports for BRA development of the air rights parcel (hereinafter called "Phase I Construction" or "Phase I Project"); and

WHEREAS, the parties wish to set forth their understandings with respect to the Phase I Project, as well as their agreement to cooperate on the planning and development of Phases II and III of the South Station Construction.

NOW, THEREFORE, in consideration of the above and the mutual promises hereinafter set forth, the parties agree as follows:

I. Previous Agreement

This document elaborates upon but does not supersede any provisions and covenants contained in the Deed.

II. Phase I Project

A. Undertakings by the MBTA

1. The MBTA has approved final plans, specifications and contract documents necessary for construction and completion of the Phase I Construction, designated MBTA Contract No. S6CN08, South Station Intermodal Transportation Center Phase I (hereinafter called the "Phase I Project Documents"), as prepared by Hugh Stubbins/Castro-Blanco and DeLeuw Cather/Parsons, under contract to the Federal Railroad Administration, which Phase I Project Documents have been reviewed by BRA and are acceptable under the terms of the conveyance documents.

2. The MBTA shall be responsible for soliciting all bids, for awarding all construction contracts, and for providing complete supervision (i.e., project manager, assistant project manager, resident engineer, inspector(s), support staff, quality control lab and special services, etc.) of all construction of the Phase I Project.

3. MBTA shall notify and provide opportunity and access to the BRA or its designated consultant for review of all change orders and shop drawings prior to the issuance of any change order or finalization of shop drawings which pertain to, support or affect BRA's air rights parcel. Such opportunity and access for review shall be provided at least seven (7) days prior to the issuance of any such change order or shop drawing except in the event of an emergency and the BRA shall respond within five (5) working days of said notice. In no event shall any costs attributable to any change order not submitted to the BRA pursuant hereto be the responsibility of the BRA. For purposes of this paragraph, emergency shall mean any unexpected occurrence having or threatening to have a physical impact upon the project such that delay could result in a dangerous condition.

4. In the event the BRA shall approve any extra work and any proposed change order which supports, and is required by reason of its proposed air rights development, the BRA shall reimburse the MBTA for its share of the cost of such extra work or change order as provided in Section IIA.8 hereof except for any changes to any documents which are necessary because of errors of the MBTA in supervising or administering the construction.

5. At all times during the construction to be performed pursuant to the documents described herein, MBTA shall grant BRA or its designated consultant access to the construction site for the purpose of ascertaining the conformance of the construction work with that set forth in the above-described documents. No access need be permitted which would unreasonably interfere with the progress of the construction work being performed. As part of this provision, MBTA shall provide, upon the request of BRA and at BRA's expense, on-site office space with sufficient room for one person to receive, review and file construction documents and drawings.

6. BRA shall promptly notify MBTA in writing of any aspects of the construction work, which by its inspection, BRA has determined to be in such non-conformance with the documents that the construction as so performed will not adequately provide the foundations and support columns needed for the BRA air rights development. Within three (3) days of receipt by the MBTA of such notification, MBTA shall consult with BRA as to the most appropriate solution and shall forthwith direct the implementation of such change in the work as shall be agreed upon. Within seven (7) days thereafter the MBTA will furnish in writing to BRA, a description of such agreed-upon resolution. BRA shall not be required to pay for any construction of foundations or supports which are not in conformance with the design loads set forth in IIA.9. below or as modified by mutual written agreement.

7. All construction documents, logs, diaries, test results and similar information on the construction phase affecting the BRA air rights development shall be made available to the BRA or its respresentative. The MBTA shall provide to BRA access to documents and charts relating to project scheduling, deadlines, milestones, and contract progress, as available.

8. The MBTA shall provide BRA notice of all cost overruns proposed to be attributed to the costs of constructing the BRA foundations and supports, which notice shall document to BRA's reasonable satisfaction that any such cost overrun is necessary or appropriate. In the event BRA disagrees with such MBTA determination, the matter shall be resolved pursuant to the procedure set forth in paragraph C, "Cost Allocation". The MBTA shall make available to the BRA the above documents and all other required documents in sufficient time to permit BRA to comply with the time limits set forth in IIA.3. and IIB.3 hereof.

9. The MBTA shall insure that provisions are made in the construction for the superimposed loads for the proposed air rights development, as defined by the following documents:

   a. For superimposed loads for Plates I, II and III refer to Parsons Brinckerhoff Drawings "Plates I, II, and III-Forces and Moments" dated February 6, 1981 (revised May 8, 1981).

   b. For superimposed loads for Plates IV and V refer to Parsons Brinckerhoff Drawing "Load Study-Loads and Moments" dated April 28, 1980.

   c. For superimposed loads from BRA Structure West of the H-Line for Plates III, IV and V refer to Parsons Brinckeroff Drawing "Load Study-Loads and Moments: Sheet 3 of 3" dated September 30, 1980.

   d. All loads provided by Addendum #3 to MBTA Contract No. S6CN08, drawing #VLC S64 and titled Revised Foundation Line H. 19 to 34 for Hotel Addition dated October 5, 1983 as approved by the MBTA November 22, 1983.

Notwithstanding any other provision of this Agreement, it is understood that the MBTA has made no independent investigation of the adequacy of such loads for any purpose and has no responsibility for the adequacy of the above described documents.

10. After completion of construction of Phase I, the MBTA will provide the BRA, at the BRA's expense and upon the BRA's request with sepia(s) and/or mylar(s) and/or prints of "as-built" construction plans and drawings which shall have been prepared for and certified by the MBTA, as being complete and accurate. This certification shall include a statement that the completed construction will support the design loads set forth in II.A.9. above. In the event that MBTA fails to construct the foundations and support columns to support the 'superimposed loads', as described in paragraph II.A.9 hereof, MBTA shall pay the cost of providing for, whether by reconstruction, new construction or otherwise, said 'superimposed loads' prior to or during MBTA's Phase II construction. In the event that MBTA does not proceed with the Phase II construction, then MBTA shall nonetheless provide for said superimposed loads.

11. Upon completion of the construction of Phase I, the MBTA shall execute and deliver at no cost to the BRA a permanent easement adequate for the installation, use, maintenance, repair and reconstruction of the air rights foundations and supports plus access therefor.

B. Undertakings by the BRA

1. It is understood that the state and federal government, through the BRA, have made available to MBTA, funds in the amount of $4,600,000 toward BRA's share of the cost of the Project. These funds shall be expended in accordance with the provision of paragraph II.B.4., hereof and this Agreement. Additional funds shall be made available as required through the BRA from the EDA grant described in paragraph II.D.

2. The BRA has provided the MBTA with the superimposed load data set forth in paragraph II.A.9. and has reviewed MBTA plans for construction of the air rights foundations and supports to accommodate such loads. The MBTA shall not be responsible for any defects in the air rights foundations and supports based upon information or comments supplied by BRA unless such defects are due to errors of the MBTA in supervising or administering the construction.

3. If BRA shall desire any changes to any of the above documents, it shall so inform MBTA in sufficient time to permit incorporation of such changes into the pertinent documents. Such changes shall be in writing and shall indicate with specificity those portion(s) of the document(s) for which changes are proposed. Upon receipt of any such requests, MBTA shall promptly notify BRA of the design and construction cost ramifications if any. Upon BRA's acceptance of such cost obligation, and except for such items described in Paragraph II.B.9 hereof, MBTA shall incorporate the proposed

change into the relevant documents. MBTA shall not be obligated to make any such proposed change which in its opinion adversely affects the MBTA's South Station Transportation Center.

4. BRA and/or its consultants shall be given the opportunity by MBTA to participate with the construction contractor and the MBTA's engineer in the preparation of each invoice which includes costs for which BRA is responsible. Upon receipt of the contractor's invoice, MBTA shall immediately send a copy to BRA with a notation of the amount of the invoice allocable to BRA. Within five (5) business days after receipt therof, BRA shall submit the bill to its Board for action at its next scheduled meeting. Upon approval of said invoices the BRA shall make payment and/or authorize payment from funds held by the MBTA which have been allocated to the BRA's share of Project cost as described in Paragraph II.B.1 within five (5) business days. Any disputed payments shall be resolved in accordance with the procedure in Section II.C, "Construction Cost Allocation".

5. The BRA shall pay to the MBTA a fee for field supervision and management (including costs of outside construction engineering services) equal to 6 percent of the actual accepted bid price (plus applicable approved change orders) for the BRA air rights foundations and supports. The pro-rated fee for supervision and management shall be invoiced to BRA monthly, the same to be authorized for payment by the BRA in accordance with Section II.B.4.

6. Upon completion of the Phase I Project, and subsequent to acceptance in writing of the air rights foundations and supports by the BRA, the BRA shall pay to the MBTA, within thirty (30) days of receipt of a bill therefor in accordance with Section II.B.7, a final payment of the amount necessary (including any contractor's retainage) to equal the BRA's total financial responsibility under this Agreement for the Phase I construction, based upon the agreed upon allocation of unit costs and quantities utilized.

7. BRA agrees to make all payments required herein in a timely fashion and in accordance with all relevant laws, ordinances and regulations. BRA further agrees to reimburse MBTA for any interest costs incurred by MBTA pursuant to State law to the extent such interest payments are caused by BRA delay in making prompt payment.

8. It is agreed that the BRA's maximum obligation for the Phase I Construction is $6,000,000. The MBTA shall have no obligation to make any changes in the project at BRA's request or for BRA's account which would have the effect of increasing the BRA's share to over $6,000,000 without obtaining an amendment to this contract reflecting a corresponding increase in the maximum obligation.

9. BRA shall have no obligation to make any payment for any items or actions including, without limitation, any changes to any documents, which are necessary because of errors of the MBTA in supervising or administering the construction.

C. Cost Allocations and Engineering Disputes

The parties have reviewed the bids received on the Phase I construction and have agreed upon an initial allocation of cost, attached as Exhibit A. The BRA shall be responsible for additional costs, as appropriate, arising out of change orders, additional work, or additional units constructed in accordance with Sections IIA.3.&4. and IIB.3 and 9 hereof.

All engineering and cost allocation disputes shall be resolved by representatives of the BRA and the MBTA. In the event that a consensus cannot be reached by the two parties, an arbitrator, mutually acceptable to the two parties, shall be chosen whose decision shall be final and binding on the parties. In the event the parties can not agree as to the selection of the arbitrator, each party shall select an arbitrator and the two arbitrators shall select a third arbitrator whose decision shall be final and binding.

At all times the cost allocation process shall be guided by the principal that the BRA shall be responsible for all costs which occur above and beyond the costs which would be incurred by the MBTA if the BRA were not developing an air rights structure on the site but that BRA shall have no obligation regarding items described in II.B.9 hereof. To the extent possible, the final cost allocation for final settlement shall be calculated based on the actual amounts owed to the contractor based on proportionate share lump sum and unit price bid as contained in the contract price, plus agreed-upon change orders. For items for which unit prices were not required by the bid documents, the MBTA will provide a price breakdown including supplier's price quote from the contractor before any payment is made.

D. Special Provisions Relating to EDA Grant

1. The BRA has received a grant commitment from the Economic Development Administration of the U.S. Department of Commerce (hereinafter "EDA") to pay not more than $2,007,500 and not more than fifty percent of the cost of constructing a High Technology Component of the BRA's Air Rights Development, of which at least $2,007,500 will consist of local match funds. $1,600,000, provided under Section 5 of Chapter 462 of the Acts of 1978, is available, as a match and has been earmarked by MBTA for this purpose. The BRA has represented to MBTA that the City of Boston has earmarked the necessary funds to meet its obligations under the EDA Grant and this Agreement (See Exhibit B).

2. The MBTA agrees to carry out this portion of the project as agent for BRA, in accordance with EDA guidelines and regulations, where appropriate and applicable, and where not inconsistent with applicable regulations and guidelines of the Urban Mass Transportation Administration and the Federal Railroad Administration and the applicable laws of the Commonwealth of Massachusetts.

3. The EDA-eligible portion of the Phase I project is estimated at $551,560 (See Exhibit B). The general provisions of this Agreement relating to adjustments based on change orders, etc., shall apply to the EDA-eligible portion of the project.

4. The MBTA's construction contractor and supervising engineer shall be requested to structure invoices in such a way that the portion of the work eligible for reimbursement under the EDA grant is readily ascertainable. MBTA shall give BRA the opportunity to participate in the preparation of such invoices.

III. GENERAL TERMS

A. Cooperation

The parties agree to cooperate with and assist one another in the accomplishment of the Project.

B. Breach or Violation of Agreement

In the event either party hereto shall fail to comply with, or shall breach any terms or provisions, of this Agreement and the same shall continue for more than ten (10) business days after written notification from the other party specifying such failure or breach, then such other party may institute any such actions and proceedings as may be appropriate (including, without limitation, an action to compel specific performance and/or to collect any and all damages, expenses, losses, and costs caused by such failure or breach).

C. Future Agreements

It is understood by the parties that, prior to or upon completion of the Phase I Project, it will be necessary for an additional agreement to be entered into detailing the obligations of the parties with respect to the Phase II Project (Bus Terminal and Parking Deck) and Phase III Project (BRA Air Rights Development). Subsequent thereto, it will be necessary to have a permanent agreement with respect to joint maintenance, indemnification, casualties, additional easements and joint use.

D. Notices

All notices, demands, or other communications to be given or served by either party to this Agreement to or upon the other shall be deemed to have been fully given if in writing, and sent by postpaid first-class mail or by certified or registered mail, return receipt requested, addressed as follows: If to the MBTA, addressed to the MBTA, Attention: Director of Construction, Ten Park Plaza, Boston, MA 02116; and, if to the BRA, addressed to Director, B.R.A., City Hall, Boston, MA 02201. Either party may change its above address by notice to the other party in the manner herein provided.

E. Agreement Binding on Successors and Assigns

All of the terms and conditions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto and all successors and assigns of the parties. Except as otherwise provided herein, this Agreement may be amended, superceded or cancelled, and any of the terms or conditions hereof may be waived, only by a written instrument executed by the party waiving compliance. The failure of

either party at any time or times to require performance of any provision hereof shall in no manner affect the right of a party at a later time to enforce the same. No waiver by either party of any condition, or of any breach of any term or condition contained in this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach, or a waiver of any other condition or a breach of any other term of this Agreement.

F. Miscellaneous Provision

This Agreement shall be executed in four (4) counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument.

G. Headings

The headings used herein are used only for convenience of reference, are not to be considered as part of this Agreement or to be used in determining the intent of the parties hereto.

H. Contract Period

The term of this Contract shall be from the date hereof to and through December 31, 1987. Any extensions or amendments shall be made in writing and executed by both parties.

IN WITNESS WHEREOF, the undersigned MASSACHUSETTS BAY TRANSPORTATION AUTHORITY and the BOSTON REDEVELOPMENT AUTHORITY have executed this Agreement as of the day and year first above written.

MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY

Approved as to form:

By _____
Its

_____
General Counsel-MBTA

BOSTON REDEVELOPMENT AUTHORITY

By _____
Its

_____
General Counsel-BRA

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EXHIBIT "A"

SOUTH STATION TRANSPORTATION CENTER
BOSTON REDEVELOPMENT AUTHORITY

COSTS IN S6CN08

	Line Item	Description	Quantity/Cost	% Cost Applicable to BRA	Estimated BRA Cost
A.	Non-Hotel Lobby Foundation Areas				
	0232.215	Pile Redrive	336 @ $200	48.32%	$ 32,471
	0234.105	Pre-cast Pre-stressed Concrete Piles	137,420 @ $25	48.32%	1,660,034
	0330.057	4000 PSI Concrete	5,629 @ $350	48.32%	951,976
	0130.138	Structural Steel	1,481 tons*	48.32%	1,256,627
B.	Hotel Lobby Foundation Areas				
	0232.215	Pile Redrive	9 @ $200	81.75%	1,472
	0234.105	Pre-Cast Pre-stressed Concrete Piles	11,476 @ $25	81.75%	234,541
	0330.057	4000 PSI Concrete	116 @ $350	81.75%	33,191
	0130.138	Structural Steel	69 tons*	81.75%	99,052
C.	Fixed Cost Items				
	0222.435	Contamination	Lump Sum		19,980
	0212.705	Granite Removal	Lump Sum		10,989
				SUBTOTAL:	$4,300,333
D.	Construction Management				
			6% of BRA Cost		$ 258,020
				TOTAL	$4,558,353

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* Note 1

A. Foundation Areas 2 & 3

Steel Cost (Materials only)	$1,256/ton
Erection Cost	$ 500/ton
TOTAL STEEL COST:	$1,756/ton

B. Foundation Area 4

69 tons X $1,756/ton	$ 121,164
X BRA cost-share (.8175)	99,052

EXHIBIT "B"

SOUTH STATION TRANSPORTATION CENTER

Statement of Available Funds for South Station - Phase I for Boston Redevelopment Authority Items:

SOURCE	DESCRIPTION	AMOUNT
UMTA MA-03-0088	Construction of Foundations	$3,000,000
EOTC CHAPTER 462 (Acts of 1978)	Construction & Administration of Foundations	1,600,000
EDA Grant	Construction of High Technology Foundations	650,000
City of Boston	Bond Allocation	750,000
	TOTAL:	$6,000,000

ESTIMATED BREAKDOWN OF BRA S6CNO8 COSTS BY SOURCE

Total Foundation Cost Estimate:		$4,558,353
EDA Grant	$ 551,560	
EOTC Grant (as EDA Grant Match)	551,560	
UMTA Grant	3,000,000	
EOTC Grant (not as EDA Grant Match)		455,233
Contingency		$1,441,647
	TOTAL	$6,000,000

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